In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1302

HENRY BESSEGEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 433 F. 2d 861.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 1970. A petition for rehearing was denied on December 14, 1970. Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari to February 4, 1971, and on February 3,

1971, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a mail and securities fraud case involving the sale of area trading stamp franchises, petitioner's former sales managers were properly permitted to testify regarding their opinions of the economic feasibility of the operation.

2. Whether statements of petitioner's salesmen, out of his presence, in selling franchises were properly received as evidence against petitioner.

3. Whether the court's comments in ruling on two defense objections were prejudicial.

4. Whether an instruction that, as a matter of law, franchise contracts were securities requires reversal of the convictions on the mail fraud, as well as the securities fraud, counts.

STATEMENT

After a jury trial in the United States District Court for the District of Minnesota, petitioner was convicted on 21 counts of mail fraud and four counts of securities fraud, in violation of 18 USC 1341 and 15 USC 77q(a). He was sentenced to five years' imprisonment on each count, the sentences to be served concurrently.

The evidence showed that, in 1963-1965, petitioner originated and promoted a "cash" trading stamp plan, called Goal Systems. Petitioner's plan provided for redemption of trading stamps for cash or deposits

in interest-bearing savings accounts, rather than for merchandise. In his sales literature, petitioner indicated that consumers would receive a "bankable" trading stamp from merchants and could, by means of such stamps, both "buy and bank" (1 T. 17, 109, 112, 221, 224, 2 T. 340, 3 T. 481, 7 T. 49-50).[1]

Petitioner employed salesmen (5 T. 48, 7 T. 59, 63) who sold franchises on a county basis in several midwestern and western states (1 T. 106, 144, 186, 2 T. 239). Contracts were labelled "profit sharing area franchise agreements" and the franchisee sometimes received a profit sharing certificate (1 T. 113, 124). The franchisees were required only to advance money to Goal Systems. The franchise agreements provided that the money would be used to pay "stamp" salesmen, who would conduct an enrollment campaign in the county to persuade retailers to offer Goal System stamps. Goal System stamp pads were to be sold to merchants at $9.50 each. A portion of the proceeds was to be set aside for redemption (5 T. 4, 51). Another portion was to be disbursed to franchise holders, who were to be paid 40¢ per stamp pad sold within their county until they had recouped their investments; thereafter, a lesser amount was to be paid "in perpetuity". The agreement provided that if a franchise buyer became dissatisfied within two years of his purchase, his investment, less any interim payments made as a result of the sale of stamp pads,

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[1] "T." preceded by the volume number refers to the nine volume trial transcript which we are lodging with the Clerk of this Court. The first four volumes are consecutively paginated, while the others are individually paginated.

would be returned (1 T. 106, 114, 116, 140, 144-145, 155-156, 164-165, 187, 2 T. 327, 3 T. 556, 5 T. 6).

From October 1964 to October 1965 Goal Systems franchise sales approximated $225,000 (6 T. 51).[2] Monthly dividends to franchise holders during this period were nominal, when paid at all, (1 T. 159, 231, 2 T. 343, 365, 394), and totalled approximately $3,800 (6 T. 31). Requests by franchisees for refunds of their investments were never honored (1 T. 196, 2 T. 343, 365). Petitioner disbursed all money collected so that at the end of October 1965 the accounts showed a net deficit.[3] Payments for carpeting for petitioner's home were included among the disbursements (6 T. 53, 7 T. 132, 134, 8 T. 17).

Although there was some sale of stamps (6 T. 30), the program did not become operational in a single county. There was little sales development work done and few merchants enrolled in the stamp plan in the counties for which franchises had already been sold. (1 T. 122, 158, 163-166, 186, 227, 2 T. 421, 3 T. 505-507, 560, 594).

ARGUMENT

1. Petitioner contends that two of his former employees, whom he characterizes as lacking "any special skill or knowledge in the field of accounting"

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[2] Included in this total were remittances from sales of franchises sold in California after that state in July 1965 had ordered Goal Systems to cease selling franchises and stamps there (2 T. 232, 238, 374, 414, 426, 7 T. 135-140).

[3] Goal Systems had a comptroller, but only petitioner or his wife had access to the books of record and they handled all funds (3 T. 568, 4 T. 670-671).

(Pet. 8), should not have been permitted to give their opinions regarding the economic viability of the trading stamp plan. However, these witnesses had been petitioner's sales managers and had studied the Goal System plan. They were thus qualified, by knowledge and experience, to render opinions on whether it was economically sound. The opinions, moreover, were based not upon complex business factors but primarily upon relatively simple arithmetic calculations (see 4 T. 575-595, 607-616, 630-637, 682-683). Of the $9.50 proceeds from the sale of one pad of stamps, 60 per cent was to be set aside for redemption. The remainder was used for various payments to salesmen, franchisees and merchants and customers who enrolled in the plan. The computations upon which the opinions that Goal Systems was not economically sound were based were thus quite easily verified, enabling the jury to determine the question for itself (Tr. 630-637).[1]

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[1] On cross-examination, one of the witnesses, Nicolin, was confronted with an earlier letter praising the plan that he had written while he was serving as a sales manager. On redirect, Nicolin explained that he had later formed the opinion that the plan was fraudulent (4 T. 697-699, Pet. 9). Petitioner complains of this testimony (Pet. 9-10). His only objection at the time, however, was that the testimony was repititous. Earlier testimony, received without objection, establishes that the study of costs and an examination of contracts with altered dates had caused the two sales managers and the comptroller of Goal Systems to bring the Goal Systems plan to the attention of the local United States attorney in Minneapolis (4 T. 596, 623, 685-686). Thus, Nicolin's in-court opinion, as defense counsel said, added nothing to the previous testimony that key employees feared that petitioner's plan was illegal.

2. Petitioner contends that the hearsay statements of his salesmen in selling the franchises, made out of his presence, should not have been admitted into evidence because they were not binding on him. (Pet. 12, 22-25). The statements consisted essentially of descriptions of the plan to prospective purchasers. At trial, there was no dispute as to how the basic plan was supposed to work (5 T. 60-61, 67, 6 T. 70-74, 90, 95, 99, 7 T. 49). Petitioner hired many of the salesmen and directed them. Others, who were hired by petitioner's representative in California were instructed pursuant to information received from petitioner (3 T. 480, 4 T. 663, 667, 669, 674, 5 T. 12, 29, 49, 53, 61, 7 T. 72-73). Under these circumstances the statements by the salesmen were admissible against petitioner under basic principles of agency even though the salesmen were not named as defendants nor as co-conspirators. See *United States* v. *Granello*, 365 F. 2d 990, 995 (CA 2), certiorari denied, 386 US 1019; *Reistroffer* v. *United States*, 258 F. 2d 379, 387-388 (CA 8), certiorari denied, 358 US 927; see *Lutwak* v. *United States*, 344 US 604, 617. Moreover, the court, as the court of appeals held, gave a proper limiting instruction (8 T. 83-84; see Pet. 23) regarding the use of this evidence (Pet. App. 7a-8a).

3. Petitioner argues that two comments by the trial court in ruling on the admissibility of evidence, during the nine day trial, were prejudicial and warrant reversal. This contention is fully answered in the opinion below. (Pet. App. 5a-7a).

4. Petitioner contends finally that his conviction on all twenty-five counts was rendered invalid by an allegedly erroneous instruction, to which no objection was made, that the franchise contracts were, as a matter of law, securities (Pet. 17-22). The court below noted that petitioner's contention as to the impropriety of the instruction was "not without merit" (Pet. App. 9a). But it held that even if an error invalidated the convictions on the four securities fraud counts, convictions on the remaining 21 mail fraud counts, on which petitioner had received concurrent sentences, were unimpaired (Pet. App. 9a). This ruling was plainly correct, for whether or not the contracts were securities was irrelevant to any element required for conviction of mail fraud.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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